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TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matter is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Respondent acknowledges that the facts are somewhat complex, and that different witnesses testified to conflicting statements. Although Informant has attempted to set forth the relevant facts, it must be noted that certain statements are alleged to have been made by one person, which statements come from the testimony of a different person, and not from the individual alleged to have made said statement. Informant has attempted to point this out in various instances, and with the clarification that there are other instances in which this has occurred, which will be discussed more thoroughly in the argument portion of the brief, Respondent adopts the statement of facts set forth by Informant.

Furthermore, Respondent sets forth the following timeline of facts, similar to that set forth by Informant, but with a few clarifications, to hopefully clarify the same for this Honorable Court in reaching its decision.

April 30, 1998	Respondent's Father, Manuel Fernandez dies. **App. 131**
May 1998	Respondent and her stepmother, Rosario Fernandez meet with Mr. Spalding, probate and estate attorney. **App. 59 (T. 159-160).**
March 1999	Respondent meets with Mr. Osterholt attorney, to file a rent and possession lawsuit against Ms. Singer, a Washington University student/tenant **App. 49 (T. 119-**

	120) in one of the buildings owned by Respondent's father **App. 32 (T. 50)**. There is conflicting testimony as to what Mr. Osterholt was informed as to the ownership of the building.[1]
May 5th 1999	Respondent signs a petition for probate of the will of her father **App. 37 (T. 71-73)**; there is conflicting testimony as to whether the year of date of death was left blank or not when signed by Respondent.[2]
October 1999	Rent trial commences, and Mr. Osterholt orally amends the petition to name Respondent as personal representative of her father's estate, rather than suing in her individual name. Mr. Osterholt had previously amended the lawsuit to name Ms. Singer's father, Dr. Singer of New York, as a Defendant as the guarantor of his daughter's lease. At trial, Dr. Singer brings forth a document that reveals the Petition for Probate of Will was filed

[1] Respondent states she constantly told Mr. Osterholt she did not own the building. **App. 34 (T. 60) App. 107.**

[2] Respndent states the year was blank and Mr. Spalding said they would try to get it in probate that way. **App. 37 (T. 72).**

	after the statute of limitations had expired. **(App. 53 (T. 135).** Accordingly, Respondent did not have standing as a personal representative to bring the lawsuit. Mr. Osterholt then dismisses the lawsuit with prejudice, and prepares a release, releasing Ms. Singer and Dr. Singer, but not making the release mutual as to his client, Respondent, herein.
November 2001	Dr. Singer files a lawsuit against Respondent, Mr. Osterholt, and Mr. Spalding for misrepresentation and fraud. **App. 74 (T. 221), 125-129.**
February 2002	Respondent applies to take the Missouri Bar, and reveals all pending lawsuits. **App. 4-14.**
June 2002	The Board of Law Examiners conducts a hearing at which Respondent testifies, said testimony being transcribed and attached as part of Informant's appendix. **App. 4-14.** Respondent fully discloses the pending civil fraud action against her and the Board of Law Examiners approves her character and fitness to sit for the bar. **App. 147.**
July 2002	Respondent takes and passes the Missouri Bar Exam. **App. 105.**

April 2003	The lawsuit of *Dr. Singer v. Siedband* is tried before a jury. Prior to the lawsuit, Dr. Singer enters into a reasonable settlement with both Mr. Spalding and Mr. Osterholt, leaving Respondent as the only Defendant. The jury enters a verdict in favor of Dr. Singer. **App. 89 (T. 279).** Respondent's trial attorney, Mr. Mills, files an appeal solely on the issue of standing and no other basis.
May 2004	The Missouri Court of Appeals for the Eastern District of Missouri affirms the trial court Judgment. **App. 148-153.**
	As a result of the finality of the verdict, disciplinary proceedings were commenced. Informant and Respondent submitted a proposed Joint Stipulation and Joint Recommendation of Discipline, and thereafter this Honorable Court requested briefing.

POINT RELIED ON

I.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW FOR THREE YEARS AND STAY THE SUSPENSION SUBJECT TO A THREE YEAR PERIOD OF PROBATION BECAUSE A STAYED SUSPENSION COUPLED WITH A LENGTHY PERIOD OF MONITORED PROBATION IS APPROPRIATE IN THAT, WHILE A JURY FOUND, IN A JUDGMENT THAT HAS BECOME FINAL, THAT RESPONDENT COMMITTED FRAUD AGAINST A PROBATE COURT, THERE ARE MITIGATING CIRCUMSTANCES, INCLUDING THE FACT THAT THE CONDUCT OCCURRED BEFORE RESPONDENT WAS ADMITTED TO MISSOURI'S BAR AND RESPONDENT WAS CANDID ABOUT THE PENDENCY OF THE CIVIL LITIGATION IN HER APPLICATION PROCESS, AND HER INTERVIEW BEFORE THE BOARD OF LAW EXAMINERS, IN ORDER TO SIT FOR THE MISSOURI BAR EXAM.

ARGUMENT

I.

THE SUPREME COURT SHOULD SUSPEND RESPONDENT'S LICENSE TO PRACTICE LAW FOR THREE YEARS AND STAY THE SUSPENSION SUBJECT TO A THREE YEAR PERIOD OF PROBATION BECAUSE A STAYED SUSPENSION COUPLED WITH A LENGTHY PERIOD OF MONITORED PROBATION IS APPROPRIATE IN THAT, WHILE A JURY FOUND, IN A JUDGMENT THAT HAS BECOME FINAL, THAT RESPONDENT COMMITTED FRAUD AGAINST A PROBATE COURT, THERE ARE MITIGATING CIRCUMSTANCES, INCLUDING THE FACT THAT THE CONDUCT OCCURRED BEFORE RESPONDENT WAS ADMITTED TO MISSOURI'S BAR AND RESPONDENT WAS CANDID ABOUT THE PENDENCY OF THE CIVIL LITIGATION IN HER APPLICATION PROCESS, AND HER INTERVIEW BEFORE THE BOARD OF LAW EXAMINERS, IN ORDER TO SIT FOR THE MISSOURI BAR EXAM.

In determining the discipline to be imposed on an attorney, this Honorable Court has the right to consider all circumstances that are relevant, the merits of each case, and

in particular, mitigating circumstances.[3] Respondent would like to set forth some of the important mitigating circumstances that hopefully will be considered by this court.

First, it cannot be overlooked that the facts which gave rise to the present situation occurred in May of 1999, when the will was filed for probate with the Circuit Court of the County of St. Louis, Missouri. This occurred more than three years prior to the time Respondent became a licensed attorney in the State of Missouri.[4] Although Respondent was born in St. Louis, Missouri, and is an American citizen, she had been living in Spain for approximately eight years **App. 11 (T. 31)** before the filing of the will for probate. She was attending school in Spain, and although she was attending law school, **App. 30 (T 42-43)** which in Spain is a five-year program, the emphasis is on codified law and primarily memorization of various codes. There is no focus on American law, and in particular no focus on probate or estate procedures.

Secondly, a review of the applicable rules of professional conduct specifically state that "a lawyer shall not …".[5] Although as the Informant has pointed out this Court

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[3] *In re Thomas P. McBride*, 938 S.W. 2d 905 (Mo. banc 1997); *In re John J. Carey and Joseph P. Danis*, 89 S.W. 3d 477 (Mo. Banc 2002) ; In re Cupples, 952 S.W. 2d 226 (Mo. banc 1997).

[4] Informant points out the lack of Missouri case law dealing with these facts, see *State ex rel Johnson v. Gebhart* 87 Mo. App. 542 (1901)

[5] Rule 4-3.3(a) "A lawyer shall not knowingly …"

Rule 4-8.4 "It is professional misconduct for a lawyer to…"

has the right to examine pre-admission conduct, the rules themselves relate to the conduct of lawyers, as opposed to non-lawyers. Respondent, in reality, was no more than a layman, seeking professional assistance from licensed attorneys after the death of her father, as far as the probating of his will, and the landlord-tenant action. Other than this instance she has never been the subject of any disciplinary proceedings.

Thirdly, upon learning that the will had been improperly filed, she terminated the services of Mr. Spalding, and immediately followed the advice of Mr. Osterholt in dismissing the probate administration thereby taking remedial action. **App. 141-143.**

Fourth, it cannot be overlooked that Respondent had nothing to gain financially by having the will probated. Under the will, with the exception of personal effects, the estate was left to her stepmother. If the will was not probated, her father would have died intestate, and she would have received one-quarter of her father's estate, which share would have approximated $150,000.00. There was absolutely no financial benefit to Respondent to have her father's will probated, and her primary concern was to see that her father's wishes were followed. **App. 7 (T 14-15), -12 (T 34-35).** As will be discussed below, there were a few different ways in which to achieve this, even absent the probating of her father's will, if she had received such advice.

Fifth, Respondent was completely forthright and fully advised the Board of Law Examiners as to all relevant facts and circumstances prior to her sitting for the Missouri Bar Exam. The transcript of her testimony before the bar examiners has been attached to Informant's brief as part of the Appendix of Exhibits, and it is evident that she was thoroughly questioned as to all of the details. Her character and fitness were thoroughly

examined, and a determination was made that she was qualified to sit for the bar examination. The details of the pending fraud suit were fully disclosed, and the only fact that has changed since that time is the resulting jury verdict which will be discussed hereinafter.[6]

Sixth, Respondent has acknowledged and accepted the responsibility for what has transpired, and has made it clear that she now understands that what occurred was improper, and that she would never engage in the same or similar conduct in the future. It should be noted that although Respondent consistently followed the advice of her attorneys throughout all of the probate and rent and possession proceedings, at no time throughout the examination by the bar examiners or these ethical proceedings, has she blamed her attorneys for her situation. As the present advocate and attorney for Respondent, with all due deference to this Honorable Court, I think I would be remiss if I failed to make a few further comments about the representation she previously received, which I think further acts as a mitigating circumstance.

Turning to her initial representation by Mr. Spalding, whether when he first met with Respondent in May of 1998, a month after Respondent's father's death, he advised her of the one year statute of limitations for filing a will for probate is really not the most relevant fact on which to focus. Rather, when Respondent returned to see him in May of

[6] There is no allegation that Respondent failed to fully and accurately reveal information on her bar application. As such, the holdings in *In re Warren* 888 S.W. 2d 334 (Mo. banc 1994) are distinguished and do not apply.

1999, Mr. Spalding, being an experienced probate and estate attorney, was fully aware that the one-year statute had expired. It was his duty as an officer of the Court, to advise Respondent that the time had expired for probating the will and that they would have to seek other ways in which to follow her father's wishes. Respondent has been consistent in stating that when she signed the application to have the will admitted to probate, the actual year of death was left blank. No one has ever testified that Respondent advised Mr. Spalding to put down the wrong date of death, or to be dishonest in any way, so as to avoid the one-year statute of limitations.[7] Mr. Spalding testified under oath that it was a typographical error, (**App. 64 (T 179-181)** thereby negating any evidence of actual intent to defraud on the part of Respondent. The conduct of Mr. Spalding must be seriously questioned, whether Respondent has chosen to do so or not. He knew that the probate court carefully scrutinized the application for probating of wills. He knew that the one-year statute of limitations had expired. When the Probate Court accepted the application for probate, it is difficult to comprehend how Mr. Spalding could not have known something was wrong and that the application should have been rejected based on the actual date of death. **(App. 64 (T. 181) (App. 65 (T. 183-184)** It is interesting that he never forwarded a copy of the court stamped petition to Respondent, and that the first time she learned of the wrong date having been set forth was during her rent and

[7] Mr. Osterholt believed Respondent received poor advice from Mr. Spalding (App. 54 (T 138)), that she did not commit fraud (App. 56 (T 148)), and that she did not lie (App. 57 (T 151).

possession trial. Mr. Spalding admitted that he had Respondent's file brought to his desk approximately once a month, after his initial meeting with her, or approximately ten to twelve times before they met again and he proceeded to file the application. **(App. 60 (T 164))** Perhaps Mr. Spalding was concerned that he had committed malpractice by missing the statute of limitations, and was trying to protect himself by inserting the date of 1999 rather than 1998. After all, but for the landlord tenant action, in all likelihood no one would have ever noticed that the wrong date of death had been inserted, and none of the subsequent proceedings including this disciplinary proceeding would have evolved.

As mentioned, as the advocate for Respondent, I believe she received less than adequate representation. Mr. Spalding could have advised her that in order to follow her father's wishes, even though the time for probating the will had expired, she could merely renounce any interest she would otherwise receive from her father's estate, and have the same go to her stepmother. As an alternative, he could have suggested that whatever property she receives could then be gifted to her stepmother. At that time, the amount of assets that were to be received by Respondent would be well within her unified credit, and she would not incur any gift tax consequences. Again, although Respondent has not chosen to blame Mr. Spalding, but for his actions and/or inactions Respondent would not be in this predicament.

Turning to the landlord/tenant action, Mr. Osterholt admitted that Respondent informed him that her father had owned approximately six pieces of real property, and they were all in his name. A review of the client intake sheet attached to Informant's Appendix of Exhibits **(App. 107)** sets forth that Respondent did not list herself as the

owner of any real property, but rather as the onsite manager. Respondent was not a lawyer when the landlord/tenant action was filed nor when it came up for trial, the relevant dates being 1998 and 1999. She had never prepared a petition in her life, and had never instituted a lawsuit in her life. She relied on Mr. Osterholt's experience and he initially listed Respondent individually as the Plaintiff. To carry this through, if Mr. Osterholt had never amended the pleadings to list Respondent as suing in her capacity as personal representative, Dr. Singer would never have had a cause of action against her for misrepresentation. In reality, since the will was not timely filed, the real property passed by intestate succession, and Respondent had an interest in the same. As such, she could have brought the lawsuit in her own name.

Dr. Singer had signed as a guarantor on the apartment lease with his daughter, they had failed to pay the full amount of rent that was due and owing, and it should have been a simple rent case in which Respondent received a verdict for approximately $3,000.00. Unfortunately, Mr. Osterholt never verified who the real party Plaintiff should have been. **(App. 57 (T. 150).** He was advised that Respondent's father was the owner of the properties, he could have had a letter report from the title company prepared for approximately $50.00, he could have checked the index at the Recorder of Deeds office as to the ownership, which services are provided for free, and he could have taken a few minutes to check the probate file at court to verify dates on his own. Obviously Dr. Singer's attorney did exactly that, and had Mr. Osterholt done the same, we would not be here today.

Furthermore, once Dr. Singer's attorney produced the document showing the wrong date, Mr. Osterholt could have taken a voluntary dismissal of the lawsuit or a voluntary non-suit of the same. There would not have been any final adjudication, and he could have then done his homework, and re-filed the lawsuit with the proper party Plaintiff being listed. Instead, he dismissed the lawsuit with prejudice. To further compound the situation, he then prepared a release agreement giving Dr. Singer and his daughter a full release, but failing to make the same reciprocal for Respondent. If he had merely prepared a full and complete mutual release, once again Dr. Singer would have been unable to pursue any further action against Respondent. As a result, Mr. Osterholt left the door open for Dr. Singer to not only sue Respondent for misrepresentation, but Mr. Osterholt as well, as well as Mr. Spalding. As an aside, Dr. Singer made reasonable demands for settlement upon both Mr. Spalding and Mr. Osterholt, both of whom paid said demands in exchange for full releases. Unfortunately, Dr. Singer was unwilling to enter into any reasonable settlement with Respondent.

Lastly, Respondent was represented by Coggan Mills at the trial for misrepresentation, and in her subsequent appeal. Without analyzing everything that transpired, one of the critical elements of misrepresentation is that Dr. Singer would need to prove that Respondent acted intentionally, with the intent to deceive him, and that he relied upon said representation to his detriment. At the time he signed the lease for his daughter as guarantor thereof, absolutely no representations had ever been made to him by Respondent whatsoever. Although it is unclear, Dr. Singer's argument seemed to have been that Respondent or her attorney misrepresented the actual date of death to the

probate court. Taking that as true, this was not a misrepresentation to Dr. Singer, nor was it made in any way to deceive Dr. Singer. The landlord/tenant action had already been commenced, and it had been commenced in Respondent's name as an individual. And if Dr. Singer is claiming that the wrong date is a misrepresentation to him, there is no evidence to support that he ever relied on that in any manner whatsoever. As mentioned, the lease had already been executed and by the time of trial, Dr. Singer was fully aware that Respondent was not the proper personal representative, inasmuch as he and his attorney were the ones that submitted the probate exhibit to the court, with the wrong date thereon, to prove the same. Obviously, Dr. Singer never relied on the date on the probate exhibit for anything. As such, another critical element of his fraud case was lacking. It is difficult to comprehend how this case proceeded to the jury on the issue of fraud, and although Respondent fully realizes that the verdict is final and the decision constitutes a binding fact of misrepresentation as against her, when all of the underlying circumstances are considered, her legal representation throughout certainly left much to be desired. It is submitted that the legal representation which Respondent received, and followed, also should be considered as a mitigating factor.

CONCLUSION

In conclusion, there is little if any case law in Missouri to provide precedental value for Respondent's situation. This Honorable Court has the power to use its discretion to impose whatever disciplinary measures it deems appropriate under these circumstances.[8] Respondent would respectfully request that when all of the aforesaid circumstances and mitigating circumstances are considered, that the joint recommendation of the Office of the Chief Disciplinary Counsel as well as Respondent be accepted, and that the Joint Stipulation For Discipline previously submitted be approved by this Honorable Court.

Respectfully submitted,

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By:_____

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[8] Rule 5; *In re Randall B. Kopf* 767 S.W. 2d 20 (1989); *In the Matter of George H. Miller*, 568 S.W. 2d 246 (Mo. banc 1978); *In re Dan D. Weiner*, 547 S.W. 2d 459 (Mo. banc 1977).

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Sharon K. Weedin
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109

Attorney for Claimant

Richard S. Bender

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,684 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That McAfee Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Richard S. Bender